1976

James M. Burrows v. Paul McGill et al : Plaintiff-Brief of Respondent

Utah Supreme Court

James H. Faust; Jack L. Schoenhals; Attorneys for Plaintiff-Respondent;
John Green; Attorney for Defendants-Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

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JAMES M. BURROWS,

Plaintiff-Respondent,

vs.

Case No. 14621

PAUL McGILL, individually, P-M ENGINEERS, INC., PAUL McGILL, RICHARD K. KLEIN, GAIL O. PAYNE, as the Administrative Committee of the Profit Sharing and Retirement Plan of P-M ENGINEERS, INC.,

Defendant-Appellant.

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PLAINTIFF-RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

HONORABLE ERNEST F. BALDWIN

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RESPONDENT'S BRIEF

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STATEMENT OF THE KIND OF CASE

This is an action to recover vested benefits accumulated in the account of plaintiff in a Profit Sharing and Retirement Plan maintained by defendants. The defendant, P-M Engineers counterclaimed for breach of contract.

DISPOSITION IN LOWER COURT

Plaintiff's Motion for Summary Judgment was granted awarding plaintiff his vested accumulated benefits in the Profit Sharing and Retirement Plan and dismissing defendants' Counterclaim.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the Summary Judgment of the Lower Court affirmed.

STATEMENT OF FACTS

BACKGROUND

The defendant, P-M Engineers, Inc., hereinafter referred to as the Company, was a corporation organized under the Laws of the State of Utah to provide Engineering Services (R 405). During the year 1958, a Profit Sharing and Retirement Plan, (hereinafter referred to as "The Plan") was established by P-M Engineers, Inc., for the benefit of the employees (R 71). The Plan provided for an Administrative Committee of 3 members, each of whom were appointed by the Company.

During 1974, the Administrative Committee Members were defendants, Gail O. Payne, Richard Klein and Paul McGill, the President of P-M Engineers, Inc.. In addition, the defendants were all employees and members of the Board of Directors of P-M Engineers and co-participants with the plaintiff under the Profit Sharing and Retirement Plan.

From May of 1959, to January 7,1975, the plaintiff, James M. Burrows, was an employee of P-M Engineers, Inc., a period of approximately 15 years, (R 141). While an

employee, plaintiff was eligible and became a participant in the Company's Plan (R 228).

During 1974, the plaintiff worked for P-M Engineers, Inc., as a Job Inspector at the Main Post Office Project hereinafter referred to as "M.P.O." (Deposition of Paul McGill as transcribed by R. Dean Sealy, P. 65, lines 5-6).

VESTED ACCOUNT BALANCE

As of December 31,1974, the plaintiff had accumulated a gross balance of $25,183.06, in his Plan Account with 85% vesting for a total of $21,405.60 accumulated vested benefits due to the plaintiff upon his termination (R 345).

TERMINATION OF JAMES BURROWS

On December 26, 1974, James Burrows was called to the office of Paul McGill who told Burrows that he was terminated.

James Burrows stated that he was told he was being terminated because he would not purchase stock in other P-M ventures and was therefore not a "team player." (Dep. James Burrows, P. 3 lines 19-24)

Paul McGill stated he terminated James Burrows because he was removing material from the M.P.O. Site and charging unauthorized mileage and overtime. (Dep. P. McGill as transcribed by Sealy P. 71 lines 4-17)

The termination was effective as of January 7, 1975. (Dep. James Burrows, p. 31, lines 6-7)

APPLICATION FOR BENEFITS

Plaintiff made application for his benefits due under the Plan. The Administrative Committee met on February 21, 1975, and March 7, 1975, and discussed the issue of whether or not they should forfeit the plaintiff's vested benefits. (See minutes of Administrative Committee Meetings, Ex. 4 & 5 attached to Dep. of Paul McGill as transcribed by Harmon)

The Committee determined that it did not have sufficient information or grounds to forfeit the plaintiff's vested benefits and asked plaintiff to arbitrate the matter. (Ex. 4 attached to Dep. of P. McGill as transcribed by Harmon.)

PLAINTIFF'S RESPONSE

The plaintiff declined the offer to arbitrate the matter. The plaintiff made demand for payment of his vested account benefits and when no payment was made, the plaintiff commenced this legal action.

DEFENDANT's ANSWER

The defendants answered the plaintiff's Complaint alleging a right to forfeit plaintiff's vested account benefits. (R 285-297)

DISPOSITION IN LOWER COURT

The plaintiff's Complaint was originally filed with three other fellow employee plaintiffs who were denied their vested account benefits. The lower court separated the four (4) plaintiff's actions for trial.

The four (4) plaintiffs all filed Motions for Summary Judgment to be heard on the same day at the same time. One case was settled before the date of the hearing. Two cases were settled after oral argument had begun but before it was completed.

The lower court took the remaining case under advisement and rendered its decision awarding Summary Judgment to the plaintiff and dismissing defendant P-M Engineers counter-claim. Defendants appealed from the decision of the lower court.

ARGUMENT

POINT I

UPON HIS TERMINATION WITH THE COMPANY THE PLAINTIFF WAS AUTOMATICALLY ENTITLED TO PAYMENT OF HIS VESTED BENEFITS UNLESS THE PLAN COMMITTEE TOOK AFFIRMATIVE ACTION TO FORFEIT THOSE BENEFITS IN ACCORDANCE WITH THE TERMS OF THE PLAN AND HAVING FAILED TO DO SO, CANNOT FORFEIT PLAINTIFF'S BENEFITS NOW.

The provisions of the Plan relating to plaintiff's benefits are as follows:

ARTICLE I

PURPOSE OF THE TRUST

"1. It is the purpose of this trust to recognize the contribution made to the successful operation of the Company by its various employees and to regard such contribution by establishing a system of profit sharing for those employees who shall hereafter qualify as participants under this trust, and for the beneficiaries designated by such employees.

2. This agreement has been executed for the exclusive benefit of the Participants and their beneficiaries. So far as possible, this agreement should be interpreted in a manner consistent with this intent and with the intention of the Company that this trust satisfy those provision of the Internal Revenue Code relating to employees' trusts." (R 73)

ARTICLE VI

Distribution of Benefits

"2. (a) If a Participant's employment with the Company is terminated, except for retirement or by death and except as provided in paragraph 7 of this Article, after he has been a full time employee of the Company for two (2) years or more, he shall have a vested interest in the amount then standing to his credit equal to ten percent (10%) of such amount plus ten percent (10%) of such amount for each full year of full time employment in excess of two (2), up to a total vested interest in such amount of eighty-five percent (85%). Within sixty (60) days of such termination data he shall be paid the amount standing to his credit in one lump sum, or, if the Committee elects to pay him such sum in approximately equal annual installments over a period of years not in excess of ten (10), he shall be paid the first of equal annual installments within sixty (60) days of such termination data." ...(R 85)

.... FORFEITURE

"7. If a Participant's status as an employee ceases because of his discharge from employment for material dishonesty or material violation of, or refusal to follow the instructions of the board of directors of the Company, the Company shall promptly notify the Committee of the discharge of a Participant for either of these causes and the Committee shall then determine whether the Company had just cause for such discharge. Any determination by the Committee that the provisions of this Article are applicable shall be made within ten (10) days after the receipt by the Committee of notice of discharge, and written notice of such determination shall be given by the Committee to the employee, addressed by registered mail to his last known address. Within twenty (20) days after the mailing of such notice, the former employee may appeal for arbitration from the determination of the Committee, as hereafter provided in this Article. Failure to

appeal within that time shall constitute an irrevocable consent by the former employee to the determination of the Committee. An appeal shall be taken by such employee by filing a written notice of appeal for arbitration with the Committee, and by simultaneously designating one arbitrator from among the employees of the Company, regardless of whether the person so designated is a Participant under this trust. The second arbitrator shall be selected by the Committee, and such arbitrator may be an officer, stockholder or employee of the Company. The first and second arbitrators shall select a third arbitrator. The decision of a majority of the arbitrators shall be binding upon such former employee, the Committee, the Trustee, the Company, and all other parties, and shall be enforceable in any court of competent jurisdiction. Whenever the Committee determines that such employee has been discharged for cause and the time to appeal has expired, or whenever an appeal for arbitration is decided adversely to such employee, the amount standing to the credit of such Participant shall be allocated to the other Participants in accordance with the provisions of Article V. Whenever the Committee determines that there was no cause for the discharge of such employee, or whenever an appeal for arbitration is decided in favor of such employee, the amount standing to the credit of such employee at the time of his discharge shall be distributed to such former employee in accordance with the provisions of paragraphs 2 and 5 of this Article." (R 91)

A review of the provisions relating to forfeiture makes it clear that unless the committee acts to declare a forfeiture within the time limit (10 days) after notification by the company, their right, if any, to forfeit the account of a participant expires.

Whether the committee was informed by the company of the termination of James Burrows on December 26, 1974, as stated by Paul McGill, (Dep. Paul McGill, P. 5, lines 23-25; P. 6, lines 1-5) or at a later date does not

matter. The first formal meeting of the committee took place on February 21, 1975 and it is undisputed all members of the committee knew of the reasons for termination of the plaintiff by that date. The next formal meeting took place on March 7, 1975.

The official minutes of February 21, 1975 meeting are as follows:

> "The Committee determined unanimously that the actions were serious enough to warrant the arbitration and Mr. McGill stated that there were unanswered questions which had to be resolved prior to the distribution of any funds...
>
> Mr. McGill stated that all of the employees in question should be contacted so that their side of the story could be told and the matter could be cleared up immediately and the first distribution made." (Ex. P. 4 attached to Dep. of Paul McGill, Transcribed by Harmon)

The foregoing minutes disclose that even Paul McGill was not sure that the alleged acts of James Burrows warranted the drastic action of forfeiture of his vested account benefits.

The minutes reflect that the Committee knew it had to make a decision as to whether or not a forfeiture would be declared. The committee's attorney was present and advising the committee. (Ex. P. 4 attached to Dep. of Paul McGill transcribed by Harmon)

Rather than pay the vested benefits or declare a forfeiture as required by the Plan, the Committee did neither, but instead invited plaintiff to arbitrate the matter.

The failure of the administrative committee to make a decision and to declare a forfeiture within the required ten (10) days, (Article VI P. 7; R 91) after notification by the company of the discharge of James Burrows, deprived the committee of the right to make or declare a forfeiture at some later date.

In defendants-appellants brief, it is contended that a forfeiture was declared and the mere contention of such a fact raises an issue of fact and precludes a Summary Judgment.

Defendants-appellants, however, are bound by their own documentary evidence and their own testimony as contained in the depositions of the only four (4) witnesses who would be competent to testify that forfeiture was declared. Such evidence and testimony demonstrates that no forfeiture was declared within ten (10) days or at all.

The minutes of the Administrative Committee (Ex. P. 4 and P. 5 attached to deposition of Paul McGill transcribed by Harmon), reflect that no forfeiture was declared on February 21, 1975 or March 7, 1975.

The deposition of Richard Klein, one of the three members of the Administrative Committee, makes it clear that even as of the date of the deposition, (Jan. 22, 1976), no forfeiture had been declared.

"I say the committee didn't determine at that time (Feb. 21, 1975) they would not pay the benefits. The committee simply determined that it would be called in for arbitration. In other words, we did not determine he would not be paid his benefits." (Dep. Richard K. Klein P. 15 Lines 17-20)

The depositions of the other two members of the Administrative Committee also demonstrate that no forfeiture was declared on February 21, 1975; March 7, 1975; or at any time.

The deposition of Eugene Fortuna, the company Controller, a Trustee of the funds, and the accountant for the Plan, demonstrates that as of December 31, 1975, (almost 12 months later), no forfeiture of the vested account benefits of plaintiff had occurred. (Dep. of Eugene Fortuna P. 20, lines 6-26; P. 21, lines 1-3) Plaintiff's vested account benefits were still shown as posted to his account on the official ledger sheet as of December 31, 1975. (Dep. of Eugene Fortuna P. 21, lines 1-3)

No issue of fact exists concerning whether or not the committee forfeited plaintiff's vested account benefits within the required ten (10) days.

The minutes of the Administrative Committee, the testimony of the three members of the committee and the Trustee and accountant for the Plan all demonstrate that no forfeiture was declared at any time, let alone within the required ten (10) days.

Since no forfeiture was declared within ten (10) days after notification of termination by the company or at all, the lower Court found there was no issue of fact and the right of the Administrative Committee to declare a forfeiture had expired. The decision of the lower Court stated:

> "That the defendants failed to follow the provisions of the Profit Sharing Plan, having failed to make a "Determination of Forfeiture" as required by the Plan and having failed to establish the right to forfeit the plaintiff's Profit Sharing Account, are not entitled to retain the funds due plaintiff and the defendants, having failed to determine the funds would be paid to plaintiff over a period of time, and having failed to follow the provisions of the Plan are obligated to pay plaintiff the sums due plaintiff together with interest accrued thereon." (R432)

The foregoing decision was based upon the provisions of the Plan and the undisputed facts. The respondents request that it be upheld and sustained by this Court.

POINT II

JAMES BURROWS WAS AUTOMATICALLY ENTITLED TO PAYMENT OF HIS VESTED BENEFITS IN ONE LUMP SUM WITHIN SIXTY (60) DAYS OF HIS TERMINATION WITH THE COMPANY.

James Burrows had been an employee of the company for approximately fifteen (15) years. He had become a participant in the Plan and had accumulated a total gross balance in his account of $25,183.06 as of December 31, 1974. (R 345)

His account had become 85% vested as of December 31, 1974 and as such James Burrows was entitled to vested benefits of $21,405.60 upon his termination with the company. (R345) The foregoing facts are undisputed and are admitted by defendants-appellants.

Payment of the benefits was automatic under the terms of the Plan. Article VI "Distribution of Benefits", Paragraph 2 (a) provides the following:

> If a participant's employment with the Company is terminated, except for retirement or by death and except as provided in paragraph 7 of this Article, after he has been a full time employee of the Company for two (2) years or more, he shall have a vested interest in the amount then standing to his credit equal to ten percent (10%) of such amount plus ten percent (10%) of such amount for each full year of full time employment in excess of two (2), up to a total vested interest in such amount of eighty-five (85%) percent. Within sixty (60) days of such termination data he shall be paid the amount standing to his credit in one lump sum, or, if the Committee elects to pay him such sum in approximately equal annual installments over a period of years not in excess of ten (10), he shall be paid the first of equal annual installments within sixty (60) days of such termination data. (R 85)

The foregoing provisions of the Plan demonstrate that upon termination of an employee, the vested benefits must be paid within sixty (60) days unless the committee takes affirmative action to defer payment of the benefits over a maximum period of ten (10) annual equal yearly installments.

The committee took no action to make a determination of deferred payment of benefits. After the expiration of sixty (60) days, the right to make a determination of deferred payments expired and plaintiff became entitled to a lump sum distribution of his benefits and the lower Court so found:

> "... the defendants having failed to determine the funds would be paid to the plaintiff over a period of time... are obligated to pay plaintiff the sums due the plaintiff, together with interest accrued thereon." (R 432)

It is admitted by defendants-appellants, that the committee did not determine that it would pay benefits to plaintiff over an extended or deferred period and the foregoing decision of the lower Court is supported by the provisions of the Plan and undisputed facts.

POINT III

THE LOWER COURT'S DECISION WAS BASED UPON THE FAILURE OF THE DEFENDANTS-APPELLANTS TO FORFEIT THE PLAINTIFF'S VESTED BENEFITS DUE UNDER THE PLAN.

Throughout defendants-appellants brief it continually refers to alleged "issues" of fact regarding the conduct or alleged misconduct of James Burrows and continually claims the lower Court's decision was based upon a resolution of issues of fact which were in dispute. A representative summary of such allegations is found at page 10 of defendants-appellants brief as follows:

"The lower Court addressed itself to this particular question and found that, as a matter of law, the acts of the Plaintiff did not constitute material dishonesty or the failure to follow the instructions of the Board of Directors. At pages 477 through 482 of the transcript of the hearing on the Motion for Summary Judgment, the Court discussed a theory that the acts of the Plaintiff had to relate to his employment in order that the right to forfeit be invoked and, once again, the Court found, as a matter of law, these acts did not relate to his employment and, therefore, the right to forfeit was not established."

These claims and others like them throughout the entirety of defendant's-appellant's Brief are totally unsupported by the record.

The lower Court's decision makes no reference whatsoever to the conduct or alleged misconduct of James Burrows.

"1. That the defendants failed to follow the provisions of the Profit Sharing Plan, having failed to make a determination of "forfeiture" as required by the plan and having failed to establish the right to forfeit the plaintiff's Profit Sharing Account, are not entitled to retain the funds due plaintiff and the defendants, having failed to determine the funds would be paid to plaintiff over a period of time, and having failed to follow the provisions of the plan, are obligated to pay plaintiff the sums due plaintiff together with interest accrued thereon." (R 432)

The "issues", if any, relating to the conduct or alleged misconduct of James Burrows and the interpretation of the meaning of "material dishonesty" were not decided by the lower Court. The lower Court

found that no forfeiture was declared by the Plan Committee and therefore the determination of other "issues" became unnecessary.

Although the lower Court explored the other "issues" thoroughly during oral argument, it did not base its decision upon them.

POINT IV

DEFENDANTS DID NOT RAISE ANY ISSUES OF FACT AT THE TRIAL LEVEL.

The question of whether or not the conduct or alleged misconduct of James Burrows constituted material dishonesty was not decided by the lower Court and is not before this Court now.

The defendants-appellants claim that by merely contending an issue of fact exists, their contention alone precludes a Summary Judgment.

Rule 56 of the Utah Rules of Civil Procedure requires that after a Motion for Summary Judgment is filed, the defending party may not rely upon mere contentions or allegations alone to raise a genuine issue for trial. Rule 56 (e) provides as follows:

> "When a Motion for Summary Judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by Affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, Summary Judgment, if appropriate, shall be entered against him."

The case of Reliable Furniture vs. Fidelity Guaranty Insurance Underwriters, Inc. 16 Utah 2nd 211, 398 P2nd 685 (1965) does not nullify Rule 56 (e) as contended by defendants-appellants in their brief. The Reliable Furniture case involved a dismissal of an action by the trial Court at a pre-Trial conference even though no motions for Summary Judgment or supporting Affidavits had been filed. This Court in the Reliable Furniture Company case stated the following:

> "It is appropriate to reiterate that the dismissal of an action at Pre-Trial, which peremptorily turns a party out of Court, is a drastic action which should be used sparingly and with great caution. This is especially true where the dismissal is ordered without any Motion for Summary Judgment being filed to put the party on notice of such contemplated action and afford him an opportunity to meet it." (Emphasis added)

The Reliable Furniture Company case is not applicable to the case at hand. In the case at hand a Motion for Summary Judgment and an extensive memorandum was filed and served upon the opposing party. The opposing party (defendants-appellants) had ample time and did respond to the Motion for Summary Judgment.

Prior to the time that plaintiff filed its Motion for Summary Judgment, plaintiff took the depositions of all of the defendants and every

witness known to be competent to testify on the issues raised in the pleadings. In addition, extensive interrogatories were served upon the defendants.

Plaintiff then filed a Motion for Summary Judgment and prepared a fifty (50) page memorandum (R 352-401) in support of its Motion for Summary Judgment. The memorandum extracted applicable portions of the nine (9) depositions and the answers to interrogatories submitted by the defendants.

The defendants-appellants responded to the memorandum but did not cite any portions of the depositions or interrogatories to support a claim that an issue of fact existed. A review of defendants' memorandum (R 422-430) further discloses that no Affidavits were filed to raise any issue of fact.

The defendants are bound by their Answers to Interrogatories and their depositions. The witnesses who were deposed were subjected to examination by both sides and their testimony appears to be clear and unambiguous.

Defendants-appellants contend that issues of fact exist but they did not cite any record to substantiate their claim at the trial Court level.

POINT V

THE CLAIM MADE BY DEFENDANTS-APPELLANTS THAT THE CONDUCT OF JAMES BURROWS WASN'T AUTHORIZED BY PAUL McGILL DOES NOT GIVE RISE TO A PRESUMPTION THAT THE CONDUCT OF JAMES BURROWS WAS IMPROPER OR MATERIALLY DISHONEST.

The question of whether or not the conduct or alleged misconduct of James Burrows constituted "material dishonesty" was not decided by the lower Court. Because that "issue" was not decided by the lower Court it is not before this Court now.

However, since defendants'-appellants' brief directs so much attention to the word "unauthorized" plaintiff will briefly comment on the defendants' use of the word "unauthorized."

Defendants-appellants use the word "unauthorized" as though it were synonomous with the phrase "improper" or "materially dishonest" when in fact such is not the case.

REMOVAL OF MATERIALS

James Burrows, with the permission of the various sub-contractors, removed scrap and surplus bricks, scrap lumber and a power pole from the construction site. All of the competent witnesses to the foregoing events have been deposed. There is no evidence or record that will support a contention that James Burrows did not have the permission of the foregoing to remove the said construction debris.

Defendants-appellants merely contend that Paul McGill did not "authorize" the removal of the materials. The record does not contain any evidence that prior to the removal of the materials Paul McGill or anyone ever told James Burrows or anyone they could not remove such scrap materials. In fact, the record shows that it was common practice in the construction industry for site personnel to remove such scrap materials. (See Dep. of Floyd Young) After the events occurred, Paul McGill told James Burrows such conduct was not "authorized" by him.

MILEAGE

Defendants-appellants do not deny that James Burrows incurred mileage on company business and that he submitted claims to the company for reimbursement and was paid by them. They merely assert that Paul McGill did not "authorize" the mileage reimbursement. They claim an issue now exists as to whether such conduct constituted "material dishonesty."

OVERTIME

James Burrows was working as an inspector on a Federal project, the M P O (Main Post Office). His duties were to inspect the construction of the building. He was also directed to plot curves

and graphs. He stayed on site during working hours inspecting the building. After working hours, he plotted the curves and graphs.

Defendants-appellants do not contend that James Burrows did not work the overtime or that it was not worked while performing company business. They do not contend that time card claims were not submitted to appropriate office personnel and paid by them. They merely contend that the overtime was not previously "authorized" by Paul McGill. They contend this raises an issue of whether or not the conduct of James Burrows was "materially dishonest." It might be noted parenthetically that Federal Law requires payment of the overtime hours worked whether Paul McGill "authorized" the payment or not. Neither the record nor the testimony of Paul McGill established that James Burrows was told not to work overtime until after the overtime was incurred.

POINT VI

THE COURTS HAVE UNIFORMLY HELD THAT A PROFIT SHARING AND RETIREMENT PLAN IS A CONTRACTUALLY BINDING DOCUMENT BETWEEN PARTIES AND THE FORFEITURE CLAUSES CONTAINED THEREIN ARE TO BE CONSTRUED LIBERALLY AND IN FAVOR OF THE EMPLOYEE.

Although the language of most Profit Sharing Plans indicate that a trust is created, the Courts

have held that such an arrangement creates a binding contract between the employee and the administrative committee of the plan.

In the case of Russell vs. Princeton Laboratories, Inc., 321 A 2d 800 N. J. (1967), the Court stated in regards to the Profit Sharing plan that:

> "When an employee renders service in response to the promise of the trust plan, he acquires a right no less contractual than if the plan were expressly bargained for."

In the case of Voight vs. South Side Laundry & Dry Cleaners, Inc., 128 N. W. 2d 411 Wis. (1964), the Court stated:

> "Non-contributory pension plans are held to give rise to a contractual obligation by the employer to pay pension benefits to the employees entitled thereto under the plan communicated to the employees where the employees thereafter remain in the employer's employment and render service for the requisite period. Cantor v. Berkshire Life Ins. Co. (1960), 171 Ohio St. 405, 171 N. E. 2d 518; Ball v. Victor Adding Machine Co. (5th Cir 1956), 236 F. 2d 170; Siegel v. First Pennsylvania Banking & Trust Co. (D.C. Pa., 1961, 201 F. Supp. 664; Anno. 42 A.L.R. 2d 461, 467. The same principle is applicable to profit sharing plans. Zwolanck v. Baker Mfg. Co. (1912), 150 Wis. 517, 137 N.W. 769. (Emphasis added)

In the case of Levitt v. Billy Penn Corporation, 283 A 2d 873 Pa. (1971), the Court stated:

"The employee has a contractual right to enforce the plan according to its terms and such benefits may not be denied arbitrarily even where the words such as "absolute discretion" are used, such terms do not give the administrative body unfettered discretion. It is necessary to look at the plan itself to define the limit of the Trustee's power."

The Courts have also adopted the same rules of construction in relation to Plans. In Russell v. Princeton Laboratories, Inc., previously cited above, the Court stated:

"These plans are to be liberally construed in favor of the employee."

In Levitt v. Billy Penn Corporation, also previously cited above, the Court stated:

"The question then is whether the employee should suffer a forfeiture of something he has earned. Forfeiture being disfavored we should take any tenable view to avoid it. Indeed these plans are to be liberally construed in favor of the employee."

In the case of Fretzsche v. First Western Bank & Trust Company, 336 P. 2d 589 Cal. (1959) the Court stated in regard to a pension plan:

"Pension plans are to be liberally construed in favor of the employee. Klench v. Board of Pension Fund Commissioners, 1926, 79 Cal. App. 171, 186, 249 P. 46.

The general rule is that pension plans, formulated by an employer, are construed most strongly against the employer, Sigman v. Rudolph Wurlitzer Co., 1937, 57 Ohio App. 4, 11 N.E. 2d 878, 879.

In Food Fairs Stores, Inc., vs. Greeley, 264 Md. 105, 285 A 2d 632, (1972), the Court stated:

"Forfeiture clauses should be strictly and narrowly construed - the forfeiture of the right of work is to be avoided whenever the Court can discern a rational basis for that result."

The Court also stated:

"Even though the employer has a legitimate interest in the protection of its cliental, the restrictive covenant will not be enforced if under all the circumstances the covenant is unduly restrictive of the employee's freedom. The right to labor or to use one's skill, talents or experience for one's own benefit or furnish them to another for compensation is a natural and inherent right of the individual."

POINT VII

DEFENDANT'S COUNTER-CLAIM IS BASED UPON A BY-LAW OF THE CORPORATION WHICH IS EXPRESSLY PROHIBITED BY PROVISIONS OF THE UTAH CODE, THE CORPORATE CHARTER AND IS VOID AS BEING AGAINST PUBLIC POLICY.

Plaintiff worked for Steel Contractors during the summer of 1974 for 2 or 3 weeks on weekends and in the evening. He received approximately $400.00 - $600.00. In addition, plaintiff performed detailing work in 1972, one or two nights a week for several months. This work was performed for Pedco Detailing who paid the plaintiff approximately $350.00 - $400.00.

Defendant alleges this conduct which occurred two years prior to the termination of plaintiff justifies the forfeiture of the Profit Sharing Account.

Defendant's Counter-claim alleges:

"1. That plaintiff was a stockholder of the defendant corporation.

2. That the By-Laws of the Corporation obligate the stockholders to the corporation and become a contractually binding obligation upon the stockholders merely because of the acquisition of stock of the Corporation by the stockholder.

3. That No. 6 of the By-Laws of P M Engineers, Inc., duly adopted by said Corporation on the 15th day of September, 1976, states as follows:

'All stockholders agree that any remuneration to them by an outside firm or individual for work performed of a nature engaged in by the Corporation are monies or value due and payable to the Corporation. In other words, stockholder may not engage in outside engineering or related services as an individual, nor may one or more stockholders enter into a business which provides such services and is intended to generate individual profit. This paragraph illustrates the intent and reason for the birth of this Corporation, to-wit: A welding together of individual abilities of the stockholders as a team for the mutual benefit of the Corporation and themselves. Furthermore, it is the intent and wish that each stockholder receive monetary benefit in direct proportion to his output, both efficiency wise and workwise. Therefore, in consequence, there will be no reason for outside work on the part of the stockholders and a high incentive remaining.'

4. That said By-Law constitutes a contract as between plaintiff and defendant, P M Engineers, Inc.

6. That while an employee and shareholder of P M Engineers, Inc., in violation of said By-Laws, plaintiff James M. Burrows did work for outside individuals or firms, including Steel Contractors, Inc. and Pedco Detailing Service. Said work performed was of a similar nature to that engaged in by Defendant, P M Engineers, Inc., and was performed for a potential client of P M Engineers, Inc.

7. That said acts constitute a breach of said contract and Plaintiff is liable to P M Engineers, Inc. in the amount of any remuneration received for services rendered to said outside firms or individuals; that Plaintiff should account for all sums received while working for said outside firms or individuals.

8. That the acts and conduct of the Plaintiff, James M. Burrows, were willful and malicious and that by reason of said conduct the Defendant is entitled to punitive damages and attorney's fees in this matter; and that a reasonable sum to allow the Defendant is that of $20,000.00."

The By-Law referred to in defendants' Counterclaim is worded in such a way as to appear to require a stockholder to pay money to the corporation or to be liable to the corporation for an amount in excess of the purchase price of the stock.

The Articles of Incorporation of P M Engineers expressly prohibit such a By-Law. The Articles of Incorporation contain the following statements:

"ARTICLE XIV
The private property of the stockholder shall not be liable for the debts and obligations of the corporation.
...

ARTICLE XVI
The stock of this corporation shall be non-assessable.
...

ARTICLE XIX
The Board of Directors may adopt By-Laws not inconsistent with these Articles and with law of the State of Utah and the United States of America and may repeal and amend the same from time to time."

As the above Articles of Incorporation indicate, the By-Laws shall not be inconsistent with the Laws of the State of Utah. The Utah Code Annotated, Section 16-10-4 (1) 1953, allows a corporation:

> "... to make and alter By-Laws, not inconsistent with its Articles of Incorporation or with the laws of this State, for the administration and regulation of the affairs of the Corporation."

The Utah Code Annotated, Section 16-10-23, 1953, entitled, Liability of Subscribers and Shareholders states:

> "A holder or a subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued..." (Emphasis added)

The statute clearly provides that the only obligation owed by a stockholder to a corporation is to pay for the shares of stock issued to him.

The Utah Code Annotated, Section 34-34-2, defines the public policy of Utah in relation to contracts which restrict employment as follows:

> "It is hereby declared to be the public policy of the State of Utah that the right of persons to work, whether in private employment or for the state, its counties, cities, school districts, or other political subdivision, shall not be denied or abridged on account of membership or non-membership in any labor union, labor organization or any other type of association; and further,

> That the right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion." (Emphasis added)

It is therefore clear that a mere restriction on employment is against the public policy of the State of Utah.

Not only does the By-Law purport to restrict employment, but also it purports to make a stockholder liable to the corporation.

The defendant company had the stockholders sign a Buy-Sell Agreement, but the Buy-Sell Agreement makes no mention of any such "obligation" as is contained in By-Law number six. See Exhibits 2 and 3 attached to the Amended Interrogatories of defendant. (Ex. P-2 attached to Deposition of Paul McGill)

A careful reading of the By-Law makes it quite clear that the By-Law was adopted by the Incorporators of the defendant company and that each incorporator was to receive remuneration based upon his stock ownership and work output.

Since it is clear that: (1) Plaintiff was not an incorporator of the defendant company and; (2) Plaintiff was paid on an hourly basis; this By-Law was never intended to be applied to plaintiff.

Since the defendant paid the plaintiff on an hourly basis, it is clear that the defendant company breached its own supposed contract and therefore waived any right to claim that the alleged contract binds plaintiff.

Not one case cited in defendants-appellants brief to support its Counter-claim applies to the fact situation of the case at hand. No case cited requires a stockholder to pay money to the corporation because a By-Law prohibits the stockholder from working for other companies without paying his earnings to the corporation in which he owns stock.

CONCLUSION

1. Plaintiff was automatically entitled to his vested benefits due under the plan unless defendants-appellants acted to forfeit those benefits in the manner and the time prescribed by the plan. The defendants- appellants did not forfeit the benefits within ten (10) days as required or at all and the right if any to forfeit the benefits expired.

2. Plaintiff was automatically entitled to a lump sum distribution of his benefits within sixty (60) days of termination unless within that time the plan committee acted to defer payments. Admittedly the committee took no such action and plaintiff is entitled to a lump sum distribution.

3. The lower Court's decision was based upon failure of the defendants-appellants to act to forfeit the benefits due plaintiff - - not upon a resolution of supposed "issues" of fact.

4. Defendants-appellants did not raise any "issues" of fact at the trial level and cannot now claim that such issues exist.

5. Defendants-appellants characterization of the word "unauthorized" is inappropriate. The record does not support a claim that the supposed "unauthroized" acts were also "materially dishonest."

6. Pension and Profit Sharing Plans should be liberally construed to benefit the employee.

7. The Counter-claim of defendant P-M Engineers against plaintiff is wholly without merit and is based upon a By-Law which is expressly prohibited by the Utah Code, the corporate charter itself and public policy.

8. The decision by the lower Court is amply supported by the record, is just and equitable and should be sustained and upheld.

Respectfully Submitted,

SCHOENHALS & FAUST

Jack L. Schoenhals

James H. Faust

CERTIFICATE OF DELIVERY

I certify that on the 6th day of December, 1976, I hand delivered two copies of the foregoing Plaintiff-Respondent's Brief to Mr. John Green, 410 Judge Building, Salt Lake City, Utah 84111

James H. Faust